Island Hill Sdn Bhd v Pengurusan Danaharta Nasional Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02–491 OF 2008
ZALEHA ZAHARI, MOHD HISHAMUDIN AND LINTON ALBERT JJCA
2 NOVEMBER 2011

B

Civil Procedure — Judicial precedent — Federal Court — Binding precedent — Whether High Court judge erred in failure to apply principles of Federal Court decision to present case

C

Companies and Corporations — Winding up — Inability to pay debts — Petition opposed by reason of limitation — Whether winding up petition by respondent time barred — Whether s 6(3) of the Limitation Act 1953 applied to winding up proceedings — Limitation Act 1953 s 6(3)

D

Ban Hin Lee Bank Bhd ('the bank') obtained summary judgment against the appellant in the sum of RM6,055,667.15 with interest and costs ('the judgment'). Pursuant to a vesting certificate the assets and liabilities of the bank were vested in the respondent. The respondent served a statutory notice of demand against the appellant demand payment of the monies due and owing under the judgment but the appellant failed to pay the sum demanded. Thereafter the respondent presented a winding up petition to wind up the appellant based on its failure to repay the judgment sum. The respondent's winding up petition against the appellant was founded upon the judgment that was obtained more than 14 years ago. The appellant opposed the petition. The High Court judge found that a winding up petition was not dependent on a judgment but based on the appellant's inability to pay the amount demanded by the respondent, which gave rise to a presumption of insolvency under s 218(2) of the Companies Act 1965. Thus the High Court judge granted the order to wind up the appellant company. This was the appellant's appeal against that order. The appellant submitted that the High Court judge had erred in failing to apply the principles enunciated in the Federal Court case of *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253 ('*Lim Ah Hee*'s case'), which were binding upon the High Court. The respondent submitted that s 6(3) of the Limitation Act 1953 ('the Act') and the decision of the Federal Court in *Lim Ah Hee*'s case should be confined to bankruptcy proceedings and not extended to winding up proceedings.

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Held, allowing the appeal with costs of RM10,000 to the appellant:

(1) The difference between bankruptcy proceedings and winding up

proceedings was found to be of no significance. Instead, this court found both insolvency proceedings to be similar. It was the finding of this court that winding up proceedings against a company had certain obvious affinities with the bankruptcy of an individual (see para 19).

(2) It was also found that s 6(3) of the Act applied to winding up proceedings and that these proceedings should be instituted within 12 years of the date of judgment with arrears of interest to be claimed for a period of six years from the date of judgment, for the reasons given in *Lim Ah Hee*'s case. Further, the principles of precedent required the decision of the Federal Court in *Lim Ah Hee*'s case to be followed by the High Court judge in this case and he had erred by failing to do so. As such, the decision of the High Court judge was set aside. The winding up proceedings instituted by the respondent were time-barred by reason of s 6(3) of the Act (see para 20).

[Bahasa Malaysia summary

Ban Hin Lee Bank Bhd ('bank') telah memperoleh penghakiman terus terhadap perayu sejumlah RM6,055,667.15 dengan faedah dan kos ('penghakiman'). Menurut sijil letak hak, aset dan liabiliti bank terletak hak pada responden. Responden telah disampaikan notis tuntutan terhadap perayu menuntut bayaran wang yang kena dibayar dan terhutang di bawah penghakiman tetapi perayu telah gagal membayar jumlah yang dituntut. Berikutan itu responden telah mengemukakan petisyen penggulungan untuk menggulung perayu berdasarkan kegagalannya untuk membayar balik jumlah penghakiman itu. Petisyen penggulungan responden terhadap perayu adalah berasaskan penghakiman yang telah diperoleh lebih 14 tahun lalu. Perayu membantah petisyen itu. Hakim Mahkamah Tinggi mendapati bahawa petisyen penggulungan itu tidak bergantung kepada penghakiman tetapi berdasarkan ketidakupayaan perayu untuk membayar jumlah yang dituntut oleh responden, yang menimbulkan andaian ketaksolvenan di bawah s 218(2) Akta Syarikat 1965. Oleh itu hakim Mahkamah Tinggi memberikan perintah untuk menggulung syarikat perayu. Ini adalah rayuan perayu terhadap perintah itu. Perayu berhujah bahawa hakim Mahkamah Tinggi terkhilaf kerana gagal memakai prinsip-prinsip yang diputuskan dalam kes Mahkamah Persekutuan, *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253 ('kes *Lim Ah Hee*'), yang mengikat Mahkamah Tinggi. Responden berhujah bahawa s 6(3) Akta Had Masa 1953 ('Akta') dan keputusan Mahkamah Persekutuan dalam kes *Lim Ah Hee* patut terhad kepada prosiding kebankrapan dan tidak meliputi prosiding penggulungan.

Diputuskan, membenarkan rayuan dengan kos RM10,000 kepada perayu:

(1) Perbezaan antara prosiding kebankrapan dan prosiding penggulungan didapati tidak penting. Sebaliknya, mahkamah ini mendapati kedua-dua prosiding ketaksolvenan itu adalah sama. Adalah penemuan mahkamah

ini bahawa prosiding penggulungan terhadap sebuah syarikat mempunyai kesamaan tertentu yang jelas dengan kebankrapan seorang individu (lihat perenggan 19).

(2) Adalah juga didapati bahawa s 6(3) Akta adalah terpakai kepada prosiding penggulungan dan bahawa prosiding tersebut patut dimulakan dalam tempoh 12 tahun dari tarikh penghakiman dengan tunggakan faedah yang dituntut untuk tempoh enam tahun dari tarikh penghakiman, sebagaimana sebab-sebab yang diberikan dalam kes *Lim Ah Hee*. Bahkan, prinsip-prinsip prasyarat menghendaki keputusan Mahkamah Persekutuan dalam kes *Lim Ah Hee* diikut oleh hakim Mahkamah Tinggi dalam kes ini dan beliau terkhilaf kerana gagal berbuat sedemikian. Oleh itu, keputusan hakim Mahkamah Tinggi adalah diketepikan. Prosiding penggulungan yang dimulakan oleh responden telah luput had masa disebabkan s 6(3) Akta (lihat perenggan 20).]

Notes

For cases on Federal Court, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4782–4786.

For cases on inability to pay debts, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1227–1299.

Cases referred to

Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449, SC (refd)

Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee [2004] 3 MLJ 253; [2004] 2 CLJ 787, FC (refd)

Karnos Property Co Ltd, Re (1989) 5 BCC 14, Ch D (refd)

Ridgeway Motors (Isleworth) Ltd v ALTS Ltd [2005] 2 All ER 304, CA (refd)

United Malayan Banking Corp Bhd v Richland Trade & Development Sdn Bhd [2000] 4 MLJ 670; [2001] 3 CLJ 270, CA (refd)

Legislation referred to

Bankruptcy Act 1967 s 3(1)(i)

Companies Act 1965 s 218(1)(e), (2), (2)(a)

Limitation Act 1953 ss 2, 6(3)

Pengurusan Danaharta Nasional Berhad Act 1998 s 14(4)(j)

Appeal from: Winding up Company No 28–120 of 2005 (High Court, Pulau Pinang)

Mahinder Singh Dulku (Harjit Singh a/l Harban Singh with him) (Harjit Singh Sangay & Co) for the appellant.

Andrew Chiew (CB Loh with him) (Lee Hishamuddin Allen & Gledhill) for the respondent.

Zaleha Zahari JCA:

[1] This appeal was allowed on 22 July 2011 for the following reasons.

[2] Although the memorandum of appeal lists six grounds as to why the decision of Penang High Court judge dated 28 March 2008 should be set aside, the submissions before us was confined to only one issue, ie, whether the institution of the winding up petition by the respondent against the appellant was time barred by reason of limitation pursuant to s 6(3) of the Limitation Act 1953 ('the Act'). This provision states as follows:

> An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

It is common ground that the determination of this appeal turns on the construction to be given to the words 'action upon any judgment' in s 6(3).

[3] The background facts are not in issue: Ban Hin Lee Bank Bhd ('the bank') on 26 February 1991, vide Penang High Court Civil Suit No 22–22 of 1989, claimed for monies due and owing under a RM5m overdraft facility granted to the appellant. Summary judgment was entered against the appellant in the sum RM6,055,667.15 (the outstanding sum in respect of overdraft facility as at 11 October 1998), interest at the rate of 10.25%pa on monthly rests on the first RM5m, and thereafter, at the rate of 12%pa on monthly rests on the amount in excess of RM5m calculated from 1 October 1998 until full and final settlement as well as costs ('the said judgment').

[4] Pursuant to a vesting certificate dated 14 July 1999 the assets and liabilities of the bank was vested in the respondent on 29 April 1999. We are of view the respondent was entitled and clearly had locus standi to present a winding up petition against the appellant by reason of s 14(4)(j) of the Pengurusan Danaharta Nasional Berhad Act 1998.

[5] On 18 February 2004 the respondent served a notice under s 218(2)(a) of the Companies Act 1965 to the appellant demanding payment of the monies due and owing under the said judgment. The appellant failed to pay the sum demanded.

[6] On 29 September 2005 the respondent presented a winding up petition to wind up the appellant based on the failure to pay the sum demanded. The appellant's solicitors vide notice dated 10 February 2006 opposed the petition.

[7] The High Court judge on 28 March 2008 granted an order-in-terms of the winding up petition. The reasoning of the High Court judge in arriving at the decision and conclusion which he did was as follows: The learned judge took note of the fact that a creditor's petition can only be presented when an act of bankruptcy under s 3(1)(i)of the Bankruptcy Act 1967 has been committed and is dependent on an enforceable judgment. The learned judge stressed the fact that a winding up petition is not dependant on a judgment, but based on a company's inability to pay its debt. In this case the appellant had failed to pay the amount demanded by the respondent. A presumption of insolvency under s 218(2) of the Companies Act accordingly arises.

[8] On the issue of limitation the learned judge's reading of s 6(3) of the Act and the decision of the Federal Court in *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253; [2004] 2 CLJ 787 was that that case can be distinguished on facts. The learned judge was of the view that in *Lim Ah Hee* the Federal Court had not taken into account the phrase 'action brought upon any judgment' in s 6(3). The High Court judge was persuaded by the argument that the phrase 'action brought upon any judgment' must be construed to mean a fresh action brought upon a judgment in order to obtain a second judgment and to follow the English Court of Appeal decision in *Ridgeway Motors (Isleworth) Ltd v ALTS Ltd* [2005] 2 All ER 304.The head note of this case states as follows:

> Held — The presentation of a winding up petition by a judgment creditor was not subject to the six-year limitation period applicable to bringing an action upon a judgment within s 24(1) of the 1980 Act. An action upon a judgment had the special or technical meaning of a 'fresh action' bought upon a judgment in order to obtain a second judgment, which could be executed. Insolvency proceedings, whether personal or corporate, did not fall within the scope of that special meaning. A winding up petition was neither an action upon a judgment in the special sense of being designed to re-establish by legal proceedings the liability of a company to pay a judgment debt and obtain another judgment for it, nor a process of execution of the judgment on which the petition was based. It was sui generis, being in the nature of a wider legal proceeding available for the collective enforcement of the admitted or proved debts of the company for the benefit of the general body of creditors on a pari passu basis. It was not open to the court to interpret the expression 'action upon a judgment' in s 24(1) of the 1980 Act in the sense indicated by the extended definition of an 'action' in s 38(1).

[9] For these reasons the judge made the decision which he did which is the subject matter of this appeal before us.

THE APPELLANT'S SUBMISSIONS

[10] Dato' Mahinder Singh Dulku, the appellant's counsel, submitted that

the reasoning and conclusion of the Federal Court in *Lim Ah Hee* should not be confined to bankruptcy petitions but was also applicable to winding up proceedings. In support of this proposition reference was made to *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 where Seah SCJ (delivering the judgment of the Supreme Court) at pp 452–453 states:

> Before dealing with this submission, I think I ought to remind myself that the jurisdiction in bankruptcy is an equitable jurisdiction. From the origin of the bankruptcy law — from the first statute that was passed in England — the working out of the statutes has generally, if not, universally, been committed to the Court of Chancery, and for centuries equitable principles have been interwoven into the administration of the law of bankruptcy.
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> A good deal of the confusion, if there be any, which has arisen was brought about by courts of common law fastening upon common law doctrines and applying them to the strict construction of Acts of Parliament, so that it does unfortunately happen that decisions of the common law founded upon common law doctrines have been permitted to prevail in the administration of bankruptcy. That seems to be the position in England and I would respectfully adopt it in Malaysia since our Bankruptcy Act 1967 has been modelled along the British Bankruptcy Act 1914 (see *Rengasamy Pillai v Comptroller of Income Tax* at p 234). In my opinion, the same rule should apply to the winding up of a company.

[11] The appellant's counsel also made reference to *Re Karnos Property Co Ltd* (1989) 5 BCC 14 where Mervyn Davies J at p 17 held:

> Looking at these enactments it is plain that a petition in the companies court is an 'action' within s 2(1). One then asks whether it is an action 'to recover any sum'. One may say that a petition is an 'action' seeking not to recover a sum but to secure the winding up of a company. Certainly the petition seeks a winding up order; but as well the petitioner (who is creditor — see the *North Buck*'s case) also seeks recovery of his money or such part of it as may become his by virtue of a dividend. A creditor petitioner does not petition for the satisfaction of seeking the demise of his company debtor but rather in the hope of recovering part at any rate of his debt by way of dividend. A petition therefore in my view, seeks to recover a sum … Applying those words to the petition proceedings now in train it seems to me that the cause of the proceedings arose at the latest when the company failed to pay the latest rate demand on 1 April 1981. That is more than six years before presentation of the petition. Accordingly I conclude that the petition must be dismissed …

[12] The appellant's counsel submitted that the reasoning and conclusion of the English Court of Appeal in *Ridgeway* (which was the basis of the High Court judge in arriving at the decision and conclusion which he did) was in direct conflict with the reasoning and conclusion of Abdul Hamid Mohamed FCJ (as His Lordship then was) in *Lim Ah Hee*. According to the appellant's counsel the English Court of Appeal in *Ridgeway* had engaged in

'legal acrobatics' contrary to the clear wording of the relevant provisions of the relevant Limitation Act which was correctly construed by the Malaysian Federal Court in *Lim Ah Hee*. He was of the view that unless and until *Lim Ah Hee* is overruled by the Federal Court in another case, the principles enunciated in *Lim Ah Hee* was binding upon the High Court and that the learned High Court judge had in this case erred by failing to apply the principles enunciated by the Federal Court in *Lim Ah Hee*.

THE RESPONDENT'S SUBMISSIONS

[13] Mr Andrew Chiew, the respondent's counsel submitted that s 6(3) of the Act and the decision of the Federal Court *Lim Ah Hee* were not applicable to this case and that the learned High Court judge was right in ruling that the decision of the Federal Court in *Lim Ah Hee* should be read to be a decision confined to bankruptcy proceedings and in not extending it to winding up proceedings. He stressed the fact that bankruptcy proceedings is dependant on an enforceable judgment, whereas a petition to wind up a company is not dependant on a judgment. A winding up petition based on s 218(1)(e) of the Companies Act 1965 is based on a company's inability to pay its debts. On the facts of this case as the appellant had failed to settle the statutory demand issued by the respondent, a presumption of insolvency arises under s 218(2) of the Companies Act. This difference is consistent with settled law, that bankruptcy principles are not applicable to winding up proceedings (see *United Malayan Banking Corp Bhd v Richland Trade & Development Sdn Bhd* [2000] 4 MLJ 670; [2001] 3 CLJ 270 (CA)).

[14] The respondent's counsel urged this court not to follow *Lim Ah Hee* as this decision by the Federal Court was made without taking into account the phrase, 'action brought upon any judgment' under s 6(3). He submitted this phrase bears a special meaning, ie, a fresh action brought upon a judgment in order to obtain a second judgment which can be executed. The learned judge in this case therefore did not err in ruling that a winding up petition does not fall within the meaning of 'action brought upon any judgment' and in following the decision of Court of Appeal of United Kingdom decision in *Ridgeway Motors*.

DECISION

[15] It is clear that the winding up petition against the appellant in this case is founded upon a judgment which is more than 14 years before the winding up proceedings was instituted.

[16] As to the construction to be given to the words 'action upon any judgment', the word 'action' has been defined in s 2 of the Act to include 'a suit

or any other proceeding'. As to the meaning to be given to the word 'action' in s 2 in respect of bankruptcy proceedings read together with s 6(3) of the Act, Abdul Hamid Mohamed FCJ (as His Lordship then was) who delivered the judgment of the Federal Court in *Lim Ah Hee* (at p 265 (MLJ); pp 800–801 (CLJ)) said:

> We have seen from the decided cases and I agree that a bankruptcy proceeding is not 'a writ of execution' within the meaning of O 46 r 2 of the RHC 1980. But, that does not necessarily mean that it is therefore 'an action' within the meaning of s 6(3).
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> We still have to consider the meaning of 'an action upon any judgment' in the light of the definition given in s 2 of the Limitation Act 1953, that includes 'a suit or any other proceeding'.
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> Of course, by merely looking at the word 'action' in s 6(3) it appears that the word 'action' does not include a bankruptcy proceeding. It is also clearly not a 'suit', one of the words used in the definition of the word 'action' in s 2. But, is it not a 'proceeding in a court of law' 'upon any judgment' (I am reading the provisions in ss 2 and 6(3) together).
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> I do not think that it can be argued that a bankruptcy proceeding is not a proceeding in court. Neither can it be argued that it is not based upon a judgment. There has to be a judgment before a bankruptcy proceeding can be commenced. Then going by the definition of 'action' is s 2 it is an 'action' and an action upon a judgment.
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> A question then may be asked: on the same reasoning, is an 'execution' not a 'proceeding in court'? Of course it is a proceeding in court but, I think, the distinction lies in the fact that execution is the continuation of the existing proceeding to enforce the judgment provided by the same rules of court, the RHC 1980. On the other hand, bankruptcy proceedings are provided by separate law and rules, the focus being the judgment debtor, not the debt and the object is to appoint a receiver in the person of the official assignee over the assets of the debtor and to convert the status of the debtor into a bankrupt with certain disqualification and disabilities, the most important being the loss of control over his properties to the official assignee. The fact that it is based on a judgment does not necessarily make it a continuation of the existing proceeding. Section 6(3) itself is about 'action upon a judgment'. Though the existence or non-existence of a cause of action may or may not be a factor to be considered, if we say that for there to be action there must be a cause of action, then the existence of a judgment and the failure to satisfy the judgment debt itself is a cause of action. In any event, it is a remedy provided by law, whether it is to be considered as a cause of action or not, if relevant. Furthermore, a bankruptcy proceeding is by way of petition, just like divorce, winding up or election, to name a few. Thus a bankruptcy proceeding bears the characteristics of a fresh proceeding unlike an execution proceeding.
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> On these grounds, I am inclined to the view that a bankruptcy proceeding, by definition of the word 'action' in s 2 of the Act is an 'action' and it is caught by the provisions of s 6(3).

[17] At p 267 (MLJ); p 803 (CLJ) His Lordship concluded and held as follows:

In the circumstances I would answer the first question posed to this court in the affirmative ie s 6(3) applies to bankruptcy proceedings and while a bankruptcy proceeding may be brought within twelve years of the date of judgment, arrears of interest may only be claimed for a period of six years from the date of the judgment.

[18] Does the principles enunciated by the Federal Court in *Lim Ah Hee* apply to winding up proceedings? Does the fact that it is governed by a separate law and rules and by reason of the distinction made that bankruptcy proceedings is based on a judgment, whilst and winding up proceedings, is based on a company's inability to pay its debts warrants a different conclusion?

[19] We are of the view that this difference is not of any significance. Winding up proceedings against a company clearly has certain obvious affinities with the bankruptcy of an individual. Both are insolvency proceedings. Similar to bankruptcy proceedings a judgment creditor does not petition for the satisfaction of seeking the demise of the company debtor but also in the hope of recovering part of his debt.

[20] As to whether limitation has set in by reason of s 6(3), for the reasons given by the Federal Court in *Lim Ah Hee*, our answer to this issue is 'Yes'. Our reading of s 6(3) of the Act is that it applies to winding up proceedings and must be instituted within 12 years of the date of judgment; and arrears of interest may only be claimed for a period of six years from the date of judgment. We are in agreement with the appellant's counsel that the principles of precedent and comity requires the decision of the Federal Court in *Lim Ah Hee* to be followed by the High Court judge in this case and that he had erred by failing to do so. By reason of the winding up proceedings in this case being instituted more than 12 years after judgment, such proceedings was clearly time barred by reason of s 6(3).

[21] For the above reasons the appeal was allowed. The decision of the High Court judge was set aside. Costs of RM10,000 to the appellant. The deposit to the appellant.

Appeal allowed with costs of RM10,000 to the appellant.

Reported by Kohila Nesan